SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 391

E. E. ASHCRAFT AND JOHN WARE,
Petitioners,

vs.

STATE OF TENNESSEE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

BRIEF FOR RESPONDENT.

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MAY IT PLEASE THE COURT:

Since the references in the brief heretofore filed in opposition to the issuance of the writ are to the typewritten transcript and since the record has been printed, the respondent deems it appropriate to file this brief to correctly refer to the pages of the printed record.

The federal questions made by the petition are first, the contention that the admission of the confessions of each of the petitioners deprived them of due process of law and second, that the failure of the trial judge to submit to the

trial jury the question as to whether or not the confessions were voluntarily made likewise deprived them of due process. The first contention presents three subdivisions: (1) that the confessions were extorted by protracted questioning and by torture, (2) that they were produced by questioning prior to arraignment before a committing magistrate, and (3) that the petitioners were not advised as to their rights to counsel and against self-incrimination.

Statement of the Case.

Since this Court in cases where an invasion of due process clause be set up makes its own independent examination of the record and declines to be bound by the findings of the lower court, a somewhat detailed statement of the case is necessitated.

The petitioner Ashcraft is a mature man characterized by the Supreme Court of Tennessee as being above the average in intelligence (R. 355). Petitioner Ware is an illiterate negro 21 years of age who was employed upon a construction job on which Ashcraft was employed. The deceased was the wife of petitioner Ashcraft. The record indicates that due to a numbeer of serious operations she had become extremely nervous and that marital union had become rather unbearable for Ashcraft. He had offered her a substantial property settlement if she would procure a divorce but she seems to have been unwilling to do this.

On the early morning of June 5, 1941, the deceased left their home in an automobile enroute to visit relatives in Kentucky. Sometime upon the same afternoon the attention of passers-by was directed to a parked car near a pool of water a short distance from Memphis. Officers were summoned and the body of the deceased was found floating in this pool of water. An examination of her person disclosed that she had been struck a number of times about the head with a blunt instrument, later shown to be rocks.

In spite of the fact that her wounds were of the type that would bleed profusely, no blood was found on her clothes nor were they disarranged to any appreciable degree. Part of the contents of the car had been disarranged so as to give the appearance of the commission of a robbery.

The authorities of the appropriate county immediately began an investigation of the crime. On that same afternoon they contacted the petitioner Ashcraft, took him to the morgue to identify the body of the deceased and then carried him to the county jail where he was kept until 2:00 A. M. in an effort to obtain as much information as possible relating to a solution of the crime. No complaint is made by petitioner Ashcraft at the action of the officers upon this first interview. In this first and subsequent interviews, Ashcraft made a number of statements with reference to the contention of the car driven by deceased, with reference to her having taken a certain drug and as to money which she was accustomed to carry upon her person.

As the investigation progressed the authorities in charge of it became increasingly convinced of the untruthfulness of these statements of the petitioner Ashcraft as being contradicted by the physical facts. Careful study of the situation increasingly convinced the authorities that there had been no robbery of the deceased.

Upon Saturday evening, June 14, the authorities in charge of the investigation sent an officer to bring Ashcraft to the jail for the purpose of further discussing with him these matters. Upon his arrival he was taken to a room upon the fifth floor and questioned by several officers.

Upon his arrival at the jail Ashcraft was first questioned by Mr. Becker and Mr. Battle, the latter an assistant district attorney general. These parties questioned him from about 7:00 P. M. until 3:00 A. M. the next morning. According to Becker after they had recounted to him his various

statements which investigation had proven untrue, Ashcraft made the statement to them that he realized the circumstances all pointed toward him as being the perpetrator of the crime and that he could not explain these circumstances (R. 22, 73). Thereupon the officers accused him of the murder of the deceased which he denied (R. 73, 91). The testimony is that this occurred about 11:00 P. M.

About 3:00 A. M. Becker and Battle retired from the scene and Ashcraft was left in charge of the witness Ezell. Ezell talked to him about 7:00 A. M. when Becker and Battle returned. They proceeded to interview him on Sunday until about noon, when Ezell returned and remained with Ashcraft until about 5:00 P. M. Becker took charge of him at that point and remained with him until about 11:00 P. M., when events began to happen with rapidity.

About 11:00 P. M. on Sunday night after Ashcraft had been in custody for approximately 28 hours, he expressed a desire to Becker, who was with him at that time, to speak to Ezell. Ezell was sent for and according to him, Ashcraft said that he wanted to tell the truth and that a negro by the name of Tom Ware or John Ware had killed his wife (R. 50). Ashcraft's explanation for withholding this information from the officers was that this was a mean negro and that he was afraid that the negro would burn his house if he informed the officers. Becker was called and in his presence Ashcraft repeated his story (R. 23, 50, 74, 166). The record definitely shows that this was the first time that Ware's name had been mentioned in connection with the case.

Ashcraft was then asked if he knew where Ware lived and when he informed them that he could show them the approximate location, he was taken in an automobile with several officers and they proceeded to a negro settlement where Ware lived. After an entry into the wrong house, Ware

was arrested and taken to the jail and he and Ashcraft were brought into each other's presence.

When Ware was confronted with Ashcraft, he was asked if he knew the latter and at once replied that he did (R. 51). He was then asked the last time upon which he had ridden to work with Ashcraft and according to the officers who were present, when Ashcraft undertook to prompt Ware as to the date, Ware turned to the officers and asked them if they wanted the truth and upon receiving an affirmative answer, he turned to Ashcraft and said in substance that he had "told Ashcraft when this thing happened if anything came of it he did not intend to take the entire blame" (R. 25, 51, 77, 168).

At this point Ashcraft seems to have been ignored until approximately 6:00 A. M. while the officers talked to Ware. It is rather obvious under the testimony that Ware very shortly after his arrest made a clean breast of his participation in the homicide. According to Becker, the officers reached the jail with Ware about 1:00 A. M. (R. 25, 42, 45). Ezell says that they reached there sometime after 12:00 (R. 173); Becker says that in his judgment Ware was not at the jail for more than five minutes before he began to talk (R. 27, 77). This is substantially corroborated by the testimony of Mr. Waldauer, the Court Reporter who was called to come to the jail and take down these confessions. Mr. Waldauer testifies that he received a telephone call at 1:40 A. M. to come to the jail and that he looked at his clock at the time of receiving this call.

The transcript of Ware's confession was completed at 5:40 A. M. and it was read back to him by Mr. Waldauer. Mr. Waldauer, a Court Reporter of experience and integrity, testifies that he informed Ware that he did not have to sign this confession unless he so chose (R. 140).

After Ware's confession had been completed and sworn to by him before Mr. Waldauer as a Notary Public, Ash-

craft was given a copy of the confession and according to those present, he admitted in substance that he had hired Ware to kill the deceased. After being given breakfast according to the state's testimony, he sat down and in response to questions made a statement which was taken down by Mr. Waldauer. After this statement was transcribed, Ashcraft was requested to sign it but he declined, stating that he wanted to let his lawyer see it before he signed it (R. 33, 53, 64, 81, 145, 170). No effort was made to compel Ashcraft to sign this confession after his refusal so to do. However, in the meantime, two reptuable business men of Memphis, Mr. Castle and Mr. Pidgeon had been called in to witness the confessions. Both of them testify that Ashcraft made the statements in question in their presence and that after they were transcribed and read back to him, he assented to their correctness but declined to sign them (R. 161, 177).

Ashcraft recounts a story of almost medieval torture. He testifies that the first thing that was said to him was that Becker accused him of killing the deceased (R. 198). He testifies that he was questoined for some hours but how long he could not tell because he says that the shades of the room in question were down and he could not tell whether it was day or night. It is shown, however, that contradictory to this claim, there were no shades upon the windows of the room in which he was situated (R. 42, 293). In fact, Ashcraft's co-petitioner Ware substantially contradicts him upon this phase of the matter because Ware, who was located in the same room, testifies that as soon as it got light enough he could see out the windows (R. 274). Ashcraft claims that he was placed with a strong light shining in his face and that this had its effect upon his nerves. Opposing this there is testimony in the record from Becker that the light in question was an ordinary 100 to 150-watt globe (R. 42, 90), and from Battle that it was just an ordinary light

from the ceiling (R. 293). Ashcraft testifies that he was refused food (R. 200), and was never out of the chair in which he was sitting until he was taken by the officers in search of Ware (R. 201), and that he was not allowed to go to the lavatory or given a drink of water although he asked for such (R. 202). The overwhelming mass of the testimony contradicts Ashcraft upon the question of food. Becker testifies that on Saturday night he was brought a sandwich and coffee about midnight and drank the coffee while refusing the sandwich (R. 22). Becker likewise testifies that on Sunday morning when he returned there was a tray with the remnants of a meal and a pot of coffee on it and likewise he saw evidence of Ashcraft having been fed at noon (R. 32, 74). Ezell testifies that on Sunday morning Ashcraft was given toast and coffee, that being all he said he wanted (R. 165). He testifies that on Sunday afternoon he ordered a plate lunch consisting of meat and vegetables and coffee (R. 176). Mr. Waldauer and Dr. McQuiston both testify that they saw breakfast served Ashcraft before he began to make the statement taken down by Mr. Waldauer (R. 129, 142). Becker testifies definitely that Ashcraft was permitted to leave his chair and that he was given water and taken to the lavatory (R. 93, 98). Ezell also testifies that he was given rest periods (R. 173). Becker testifies that Ashcraft was not denied the right to smoke (R. 34, 74, 98).

Ashcraft testifies that Battle asked him if he wanted a drink of liquor and that he refused (R. 201). He also testifies that Battle threatened to put a pitcher of water over his head and let it drip upon his skull (R. 201, 202). Battle emphatically denies both of these charges (R. 292, 293), and in addition, Ashcraft's contention is somewhat weakened by his express admission that upon a former trial of the case he did not make the statement that Battle had thus threatened him (R. 210, 239). Ashcraft gives as his excuse for not mentioning it at the former trial

that he was so exhausted from what he had been through that he could not think about it. This explanation is hardly tenable in view of the fact that Ashcraft admits that he had been in jail from June 14 until November and thus had ample time to recuperate (R. 239).

He also testifies that another officer by the name of Key came in the room where he was being held and rolling up his sleeves cursed him, threatened to manhandle him, slapped a cigarette out of his mouth and refused him a drink of water (R. 203). He testifies that Key took a picture of the deceased, put it upon his shoulder and then asked him if he could not feel the weight of deceased's head (R. 203, 204). Key most emphatically denies this statement of Ashcraft (R. 290-1).

Ashcraft's explanation as to the mention of Ware's name is that in the course of the questioning in interrogating him he was asked who had been riding with him in his car on the way to work and that he informed them that Ware and a white boy by the name of Tackett (R. 205). Both Becker and Ezell deny that Ashcraft ever mentioned Tackett's name to them (R. 288, 290).

In addition to the denials of the officers to whom this mistreatment is attributed, Ashcraft is contradicted by statements attributed to him, completely at variance with his claim in the present case. Dr. McQuiston, who had been the family physician of Ashcraft, was called to the jail about 5:00 A. M. upon this morning for the purpose of making a physical examination of both Ashcraft and Ware with the view to negativing any insistence that they had been mistreated. Dr. McQuiston testifies that when he went to the room where Ashcraft was being detained, Ashcraft spoke to him and that he asked Ashcraft how he had been treated and Ashcraft replied that he had been treated all right (R. 132, 133). Waldauer also testifies that he took down the remarks of Dr. McQuiston and that

his record shows that Dr. McQuiston asked Ashcraft if anyone had mistreated him and he said he had been treated fine (R. 152). Pidgeon, who is completely disinterested, testifies that Ashcraft made the statement in his presence that he had been treated mighty fine (R. 177). In addition to these disinterested witnesses, both Becker and Ezell testify that Ashcraft made such a statement to Dr. McQuiston (R. 79, 169).

As negativing Ashcraft's contention of such brutality, the testimony is to the effect that he did not look haggard or worn but appeared substantially as he did at the trial. For instance, Dr. McQuiston who made a physical examination of him, testified that he appeared normal, that he made no complaint to this physician about his eyes or any other part of his body and that his eyes were not bloodshot nor did he show any signs of not being able to read (R. 128). Dr. McQuiston testifies that Ashcraft did not look tired but looked about as he appeared to the witness at the present time (R. 132). Mr. Waldauer testifies that the eyes of Ashcraft were not bloodshot and that there was nothing the matter with him that he could see (R. 144, 145). Upon cross-examination Mr. Waldauer makes the statement that Ashcraft was much more composed at the time than was the witness and that he did not look sleepy or tired (R. 154, 155). Castle, who was present about 9:30, testifies that Ashcraft's physical condition looked very good and that there was no evidence about his eyes or otherwise to show any tiredness (R. 161). Pidgeon testifies that Ashcraft looked very cool and collected (R. 177).

Ashcraft testifies that the two officers, Becker and Ezell, told him that they were going to make up a statement on him and convict him on that (R. 210). Ezell emphatically denies this (R. 289).

Ashcraft completely denies making any statements whatsoever to the effect that he had hired Ware to kill the deceased although the fact that he did make such statements was testified to by Dr. McQuiston, Waldauer, Castle and Pidgeon in addition to the officers in the case.

Ware, while admitting the making of his confession, insists that it was extorted from him by threats of the officers. He testifies that as he left his home he was hit in the head and caused to stumble (R. 255). This is denied by three of the officers who were present, who say that no one struck him (Becker, R. 288; Ezell, R. 228; Jayroe, R. 295). He testifies that then he was placed in a sweat box or padded cell (R. 258). This is emphatically denied by both Ezell and Jayroe (R. 289, 296). He also testifies that he was threatened with mob violence if he did not confess but was told that he would not be hurt if he did confess (R. 259). Ezell and Jayroe both emphatically deny these statements (R. 289, 296). Mr. Waldauer, before whom Ware made oath to his confession, testifies positively that he informed Ware in his official capacity as Notary Public that he need not sign this confession if he did not want to do so (R. 140).

BRIEF.

I.

A denial of due process, in criminal cases, is defined as the failure to observe that fundamental fairness, essential to the concept of justice.

Lisenba v. *Cal.*, 304 U. S. 219.

II.

Whether or not due process has been denied varies according to the attendant circumstances.

Betts v. *Brady*, 316 U. S. 455.

III.

As to the introduction of confessions, the test of due process seems to be a free choice to admit, to deny or to refuse to answer, on the part of one making such confession.

Ward v. *Texas*, 316 U. S. 547;

Lisenba v. *Cal.*, *supra*.

IV.

Though this Court makes its own independent findings where there be an averment of lack of due process, deference will be paid to the findings of the Supreme Court, upon disputed questions of fact, unless such findings be without substantial support in the evidence.

Lisenba v. *Cal.*, *supra*.

V.

McNabb v. *U. S.*, 318 U. S. 332, does not lay down a rule for the government of state courts nor is the decision based upon the due process clause. On the contrary, the Fourteenth Amendment leaves the states free to adopt

their own tests as to the admissibility of confessions, so long as due process be present.

Lisenba v. *Cal., supra.*

VI.

Due process is not denied by the failure to advise against self-incrimination nor as to the right of counsel.

Wilson v. *U. S.*, 162 U. S. 613;

Powers v. *U. S.*, 322 U. S. 303.

VII.

The construction of state statutes by the court of last resort of such state is accepted by this Court in dealing with constitutional questions.

Watson v. *Buck*, 313 U. S. 387;

Minnesota v. *Probate Court*, 309 U. S. 270;

Hartford Ins. Co. v. *Nelson*, 291 U. S. 352;

Supreme Lodge v. *Meyer*, 265 U. S. 30.

VIII.

The rule in Tennessee is that the admissibility of confessions presents a mixed question of law and fact to be determined by the trial judge as distinguished from its submission to the jury, with his action subject to review at the hands of the Supreme Court.

Boyd v. *State*, 21 Tenn. (2 Hum.) 39-40;

Self v. *State*, 65 Tenn. (6 Bax.) 243-253;

Beggardly v. *State*, 67 Tenn. (8 Bax.) 520;

Woodruff v. *State*, 164 Tenn. 530;

Polk v. *State*, 170 Tenn. 270;

Rounds v. *State*, 171 Tenn. 511.

IX.

The right of the trial judge to pass upon the admissibility of a confession, to the exclusion of the jury, is well recognized and declared to be the true rule.

Wigmore on Evidence, 3rd Ed., Secs. 487, 861.

Due process can hardly be said to be denied by the adoption of a rule having such reasonable sanction.

ARGUMENT.

Since this case comes to this Court upon the claim of a denial of due process, it may be well at the outset to quote the latest expression of this Court upon that subject. From *Betts* v. *Brady, supra*, we quote the following:

> "Due process of law is secured against invasion by the federal Government by the Fifth Amendment, and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule.
>
> "Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules, the application of which in a given case may be to ignore the qualifying factors therein disclosed."

P. 462.

The writer interprets the above excerpt to mean that this Court will in each particular case appraise the facts con-

nected with the claim of lack of due process and determine such claim in the light of the facts revealed by the record.

Of course, we recognize completely that line of cases relied upon by the petitioners, the last of which is *Ward* v. *Texas*, 316 U. S. 547, wherein the earlier cases are collated. The rule deducible from *Ward* v. *Texas, supra*, and its immediate predecessor *Lisenba* v. *Cal., supra*, is that the true test of the denial of due process in the admission of a confession is whether or not the mind of the person confessing was free to admit, to deny or to refuse to answer. This rule might be stated in different terms. The test might be whether the confession be the product of the will of the person confessing or of the overpowering will of his accusers.

When the record in the present case is examined in the light of these principles, the respondent respectfully insists that it can not be said that the decision of the Supreme Court of Tennessee finding that there was no such overpowering will is erroneous. So far as the physical mistreatment of the petitioner Ashcraft be concerned, the preponderance of the evidence in the record seems to be to the effect that he was not mistreated and that his testimony in that respect should not have been accepted by the state courts. For instance, although he claims to have been most brutally threatened and tortured, two completely disinterested witnesses, one of them his family physician, attribute to him the statement just prior to the making of the confession in question that he had been well treated. Likewise, two other disinterested witnesses attribute similar statements to him just prior to the time at which he declined to sign such confession until he might consult with his lawyer. This is hardly consistent with his claim made at the trial. Likewise, it strikes the respondent that his testimony in this regard is similarly impeached by his admission that upon a former trial of the case he made no mention of

his claim that the Assistant District Attorney General threatened to put a pitcher of water above his head and let it drip onto his skull. His excuse for not having mentioned this, to-wit, that he was physically exhausted, is hardly tenable in view of the admitted fact that he had been in jail some four months since such occurrence and enjoyed that period of time for recuperative purposes. His claims of other mistreatment are particularly denied by the officers in question. In view of such denials which we have set out more particularly in the statement of facts, it would seem to the respondent that the judgment of the state court upon this disputed question of fact is not without substantial support in the evidence and that it should be accorded that degree of respect generally extended by this Court to the judgments of courts of last resort of a state. If the question of mistreatment of Ashcraft be reviewed *de novo* by this Court, it is the insistence of the respondent that the overwhelming preponderance of the evidence is to the effect that these physical cruelties testified to by him are contradicted.

But there are certain undisputed facts in connection with the making of the confession in question. These are that Ashcraft was detained for approximately 36 hours before making such confession and that he was unattended by friends and without the advice of counsel. In passing, it might be noted that he makes no claim to have requested either with a subsequent denial thereof.

It is perfectly true that this Court in a number of cases has stated that this Court will not hesitate to set aside confessions extorted from *ignorant* persons who have been subjected to persistent and protracted questioning or who have been *unlawfully* held *incommunicado* without advice of friends or counsel.

Ward v. *Texas, supra,* 555.

But the respondent respectfully insists that the present case does not fall within the scope of these decisions. In the first place, as found by the Supreme Court of Tennessee, the petitioner Ashcraft is a mature man and above the average in intelligence. Obviously, here is no ignorant and untutored person in whose mind the power of officers was clearly magnified.

Lisenba v. *Cal., supra,* 239-40.

Secondly, the Supreme Court of Tennessee in this particular case expressly held that the detention of Ashcraft was not unlawful under the state laws and that there was no unnecessary delay in arraigning him before a committing officer (R. 356, 357). Under the authorities cited in the brief proper, being a construction of the state statutes by the court of last resort of Tennessee, it should be accepted as the true meaning of the Tennessee statutes upon the subject.

The respondent respectfully insists that when the circumstances attendant on the making of the alleged confessions be taken into consideration, it definitely appears that the confessions in question were the product of the will of petitioner Ashcraft and not the result of the overpowering will of his accusers. In the first place, the statement made by Ashcraft at the conclusion of an extended period of questioning did not implicate him in the crime. On the contrary, this statement made to Becker and Ezell laid the entire blame at the door of Ware. This first statement could have been introduced upon the trial of Ashcraft without any substantial injury to the latter's legal rights because it completely exonerated him. Had the mind of Ashcraft been dominated by his accusers, it would appear that he would have made such statement to them as they desired. At least, at this point Ashcraft had enough self-possession and enough will power to see to it that the statement he

made was completely exculpatory as to him. This is rather inconsistent with a dominated will.

In the second place, the physical condition of Ashcraft would tend to indicate to a decided degree his ability to still retain his own will power and his freedom to talk or to decline to talk. As above stated, four disinterested witnesses who saw him at times ranging from about 5:30 A. M. until 9:30 A. M. upon this morning, testify that he appeared rather cool and collected to them. The integrity of these witnesses is not challenged in the record. None of them are connected with the police department or any law enforcing agency of the vicinity. Dr. McQuiston, who seems to be as near a family physician of Ashcraft as the latter has had, could not be said to be unfriendly toward him. The appearance of petitioner Ashcraft at the time of making the statements in question is hardly consonant with an overpowered mind.

But the strongest piece of evidence disclosing that the mind of the petitioner Ashcraft was not dominated is to be found in his refusal to sign the typed confession until he might submit it to his counsel. This act upon his part shows a mind clearly alive to the incriminating nature of this confession and manifestly discloses the will to refuse to answer, so to speak, upon the part of petitioner Ashcraft.

And finally, as evidencing the nature of the matter, it is undisputed that when petitioner Ashcraft declined to sign the written confession until he could obtain counsel and submit such to his counsel, no effort was made to force him to sign the same. This is hardly consonant with a dominating attitude on the part of the accusers and a submerged will on the part of Ashcraft.

The respondent respectfully insists that the confession of Ashcraft was produced by his realization that Ware had previously confessed and had bared Ashcraft's con-

nection with the homicide of the deceased and it was in the hopes of securing as favorable a position for himself as possible, as contrasted to that of Ware, that caused Ashcraft to make this confession.

So far as Ware be concerned, a holding by this Court that he was denied due process can proceed only from a finding at the hands of this Court that Ware was beaten or otherwise threatened by the arresting officers. Three of them emphatically deny all mistreatment toward Ware or any threats toward him. The record shows that these three officers who testified and Battle were the ones present (R. 75). Mr. Battle expressly denies that anyone struck either of the petitioners (R. 293). With the testimony in direct conflict upon this matter, with Ware standing alone in his assertions of threats and brutality toward him and with this contradicted by a greater number of witnesses, the respondent respectfully insists that the uncorroborated testimony of any defendant as to mistreatment should not be permitted to overturn the denials thereof after the court of last resort of a state has found the facts to the contrary. In this connection too, Mr. Waldauer, who is disinterested, is not challenged in the record and he expressly notified Ware that he need not sign the confession and swear to the same unless he was willing (R. 140).

When Ashcraft informed the officers that Ware had murdered the deceased, they might then lawfully arrest Ware without the necessity of a warrant upon such information, murder being a felony in Tennessee (Code of Tennessee, Sections 11536, 10767). The record indicates that the arrest of Ware was made between midnight and 1:00 A. M. upon this Monday morning. Having arrested Ware at this hour, they might lawfully lodge him in jail for safekeeping until the next morning when a magistrate might be found. *State ex rel* v. *National Surety Co.*, 162 Tenn., 547.

It is rather obvious under the record that there was no extended or protracted questioning of Ware such as took place in the case of Ashcraft. The officers differ slightly as to the time at which Ware was brought to the jail. Becker places the time that they reached the jail as approximately 1:00 A. M. (R. 25, 42, 45). Ezell testifies that it was sometime after 12:00 midnight (R. 173). Mr. Waldauer, the Court Reporter, was called at 1:40 to take the confession of Ware (R. 59, 146). Mr. Waldauer testifies that he began taking the statement of Ware at 2:15 A. M. (R. 138). At the most, therefore, Ware could hardly have been held in custody for more than two hours before his statement was being taken down. The officers say that he was not in the jail for more than five minutes before Ware began to talk (R. 77). The respondent respectfully insists that but one conclusion is deducible from this record and that is that when Ware was faced with the sight of Ashcraft in custody, his illiterate mind instantaneously reached the conclusion that the participation of both in the crime had been discovered and in order that the entire blame thereof should not be placed at his door, he proceeded to inform the officers as to his connection with it. Hardly any other inference can be drawn from his opening remark to Ashcraft, testified to by the officers.

The respondent thinks but little need be said as to the contention of the petitioners that the failure of the officers to warn them of their rights against self-incrimination and of their right to the aid of counsel deprived them of due process. In *Wilson* v. *U. S., supra;* and *Powers* v. *U. S., supra.*, this Court held that confessions made before a U. S. Commissioner in the course of a judicial hearing were not rendered inadmissible because the Commissioner failed to advise them of similar rights. The respondent insists that that which this Court has sanctioned does not deny due

process. The various authorities of the several states are collated in 16 C. J., 723-4, supplemented in 22 C. J. S., 1441-2.

The Tennessee cases relied upon by the petitioners are not in point. They deal with confessions made in the course of a judicial hearing before a magistrate. The statutes of Tennessee make it obligatory that the magistrate inform the party of his right to counsel and his right against self-incrimination. In the present case, the prosecution sought to introduce no statement made by either of the petitioners in the course of a judicial hearing. So far as this transcript goes, neither of the petitioners made the slightest incriminating statement at their arraignment before the magistrate. What the state did introduce consisted of statements made by each of them prior to such arraignment.

Perhaps the question most strenuously pressed upon this Court is the contention that the doctrine of *McNabb* v. *U. S.*, 318 U. S. 332, promulgating standards for prosecutions in the federal courts should be extended to prosecutions in the state courts and that no confession can be received in prosecutions in the state courts where made prior to arraignment if produced by questioning of suspects.

That the doctrine of *McNabb* v. *U. S.*, supra, is not applicable to prosecutions in state courts is made evident by the following excerpt from the opinion:

> "In the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue pressed upon us. For, while the power of this Court to undo convictions in state courts is limited to the enforcement of those 'fundamental principles of liberty and justice,' Hebert *v.* Louisiana, 272 U. S. 312, 316, which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from

the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force. Moreover, review by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction. Considerations of large policy in making the necessary accommodations in our federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the federal criminal law in the federal courts.

"The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, see Nardone v. United States, 308 U. S. 338, 341-42, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in Federal criminal prosecutions."

Pp. 340-341.

The consequences that would flow from a holding of this kind are many and varied. It would impose upon the several states a rule of procedure that due to peculiar local conditions could prove at variance with the statutory and legislative policy of such state. To extend this rule to prosecutions in the state courts and to hold that due process in each case requires that no such confession be received

in evidence runs counter to two recent expressions of this Court.

From *Lisenba* v. *California*, supra, we quote as follows:

"The aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence. Tests are invoked to determine whether the inducement to speak was such that there is a fair risk the confession is false. These vary in the several States. This Court has formulated those which are to govern in trials in the federal courts. The "Fourteenth Amendment leaves California free to adopt, by statute or decision, and to enforce, such rule as she elects, whether it conform to that applied in the federal or in other state courts. But the adoption of the rule of her choice cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law. The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false. The criteria for decision of that question may differ from those appertaining to the State's rule as to the admissibility of a confession."

P. 236.

"Does the questioning on May 2nd, in and of itself, or in the light of his earlier experience, render the use of the confessions a violation of due process? If we are so to hold, it must be upon the ground that such a practice, irrespective of the result upon the petitioner, so tainted his statements that, without considering other facts disclosed by the evidence, and without giving weight to accredited findings below that his statements were free and voluntary, as a matter of law, they were inadmissible in his trial. This would be to impose upon the state courts a stricter rule than we have enforced in federal trials. There is less reason for such a holding when we reflect that we are dealing

with the system of criminal administration of California, a quasi-sovereign; that if federal power is invoked to set aside what California regards as a fair trial, it must be plain that a federal right has been invaded."

P. 239.

If such rule be adopted the concept of due process would not vary with the particular facts of each case but on the contrary, would be governed by rigid rules. This is contrary to the quoted excerpt from the majority opinion in *Betts* v. *Brady*, supra.

The respondent insists that due consideration for the policy which a state may elect to adopt necessitates the denial of petitioners' contention. As has been stated in numerous opinions of this Court, the deliberate judgment of any state as to the best methods of enforcing its laws command the appropr[illegible]e respect of this Court and it is only where such methods obviously collide with constitutional provisions that this Court will set aside the action of such states. We, therefore, respectfully insist that this Court should not hold that due process in every case requires the arraignment of one charged with crime in the state courts prior to any questioning of such person, at the peril of having any information derived from such questioning excluded by the courts.

The other contention made on behalf of petitioners is that the failure of the trial court to submit as a question of fact to the jury the voluntariness of their confessions denies them due process. As will be seen from an investigation of the case cited in the brief proper, Tennessee for years has followed the rule that the admissibility of confessions presents a mixed question of law and fact to be determined by the trial judge but that his action in the matter is subject to

review by the Supreme Court. By this process any person against whom a confession is sought to be introduced is accorded a judicial hearing before a competent tribunal. Due process does not require that in every instance each question of fact arising in the trial of cases shall be submitted to a jury. This Court has ruled that despite the Federal Constitution, a state may modify trial by jury or abolish it entirely. See *Palko* v. *Conn.*, 302 U. S. 319, 324, and cases there cited.

Now then, if a state may, consistent with due process, abolish trial, by jury, it certainly does not deny due process to permit the court as distinguished from the jury to pass upon and determine collateral questions of fact arising in the trial of criminal cases.

As stated in Wigmore on Evidence, 3rd Ed., Section 861, the better rule is that the admissibility of confessions presents a matter to be determined by the Court alone rather than by the court and jury. We respectfully insist that a rule approved by so eminent an author can not be said to deny due process.

Before closing, however, the state wishes to repeat its observation made in the petition opposing the issuance of the writ to the effect that should this Court be of the opinion that the judgment of the Supreme Court of Tennessee against petitioner Ashcraft denied him due process, with all fairness, the judgment against Ware should likewise be reversed irrespective of the merits of his contentions. Ware was but a pliant tool in the hands of Ashcraft, and, left to his own devices, would have never dreamed of committing the homicide for which he stands convicted and the State of Tennessee rebels at the thought of seeing the greater criminal escape while the lesser pays the penalty imposed by law.

In conclusion, the respondent earnestly insists that the judgment of the Supreme Court of Tennessee did not deny the petitioners due process and that such judgment should be affirmed.

Respectfully submitted,

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(9959)

SUPREME COURT OF THE UNITED STATES.

No. 391.—October Term, 1943.

E. E. Ashcraft and John Ware, Petitioners, *vs.* State of Tennessee. } On Writ of Certiorari to the Supreme Court of the State of Tennessee.

[May 1, 1944.]

Mr. Justice Black delivered the opinion of the Court.

About three o'clock on the morning of Thursday, June 5, 1941, Mrs. Zelma Ida Ashcraft got in her automobile at her home in Memphis, Tennessee, and set out on a trip to visit her mother's home in Kentucky. Late in the afternoon of the same day her car was observed a few miles out of Memphis, standing on the wrong side of a road which she would likely have taken on her journey. Just off the road, in a slough, her lifeless body was found. On her head were cut places inflicted by blows sufficient to have caused her death. Petitioner Ware, age 20, a Negro, was indicted in a state court and found guilty of her murder. Petitioner Ashcraft, age 45, a white man, husband of the deceased, charged with having hired Ware to commit the murder, was tried jointly with Ware and convicted as an accessory before the fact. Both were sentenced to ninety-nine years in the state penitentiary. The Supreme Court of Tennessee affirmed the convictions. —Tenn. —.

In applying to us for certiorari, Ware and Ashcraft urged that alleged confessions were used at their trial which had been extorted from them by state law enforcement officers in violation of the Fourteenth Amendment, and that "solely and alone" on the basis of these confessions they had been convicted. Their contentions raised a federal question which the record showed to be substantial and we brought both cases here for review. Upon oral argument before this Court Tennessee's legal representatives conceded that the convictions could not be sustained without the confessions but defended their use upon the ground that they were not compelled but were "freely and voluntarily made."

The record discloses that neither the trial court nor the Tennessee Supreme Court actually held as a matter of fact that petitioners' confessions were "freely and voluntarily made." The trial court heard evidence on the issue out of the jury's hearing, but did not itself determine from that evidence that the confessions were voluntary. Instead it over-ruled Ashcraft's objection to the use of his alleged confession with the statement that, "This Court is not able to hold, as a matter of law, that reasonable minds might not differ on the question of whether or not that alleged confession was voluntarily obtained." And it likewise overruled Ware's objection to use of his alleged confession, stating that "the reasonable minds of twelve men might . . . differ as to . . . whether Ware's confession was voluntary, and . . . therefore, that is a question of fact for the jury to pass on."[1] Nor did the State Supreme Court review the evidence pertaining to the confessions and affirmatively hold them voluntary. In sustaining the petitioners' convictions, one Justice dissenting, it went no further than to point out that, "The trial judge . . . held . . . he could not say that the confessions were not voluntarily made and, therefore, permitted them to go to the jury", and to declare that it, likewise, was "unable to say that the confessions were not freely and voluntarily made."[2]

If, therefore, the question of the voluntariness of the two confessions was actually decided at all it was by the jury. And the jury was charged generally on the subject of the two confessions as follows:

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[1] The legal test applied by the trial court to determine the admissibility of the two confessions was stated thus:

"The Court has come to the conclusion . . . that the law in Tennessee with reference to confession is simply this: it is largely a question of fact as to whether or not a confession is voluntary, and is made without hope of reward or fear of punishment. It only becomes a question of law for the Court to decide when, from the facts surrounding the taking of the alleged confessions or statements, the Court, as a matter of law, can hold that the State has failed to carry its burden, which it has of showing that the confessions were free and voluntarily, and that reasonable minds could not differ, and could come to but one conclusion that the confessions were involuntary and forced."

[2] Notwithstanding the apparent fact that neither the trial court nor the appellate court affirmatively held the confessions voluntary, the Tennessee Supreme Court, in its opinion, restated the rule it had announced in previous cases, that, "When confessions are offered as evidence, their competency becomes a preliminary question, to be determined by the Court. . . . [If] the judge allow the jury to determine the preliminary fact, it is error, for which the judgment will be reversed." See Self *v.* State, 65 Tenn. 244, 253.

"I further charge you that if verbal or written statements made by the defendants freely and voluntarily and without fear of punishment or hope of reward, have been proven to you in this case, you may take them into consideration with all of the other facts and circumstances in the case. . . . In statements made at the time of the arrest, you may take into consideration the condition of the minds of the prisoners owing to their arrest and whether they were influenced by motives of hope or fear, to make the statements. Such a statement is competent evidence against the defendant who makes it and is not competent evidence against the other defendant . . . . You cannot consider it for any purpose against the other defendant."

Concerning Ashcraft's alleged confession this general charge constituted the sole instruction to the jury.[3] But with regard to Ware's alleged confession the jury further was instructed:

"It is his [Ware's] further theory that he was induced by the fear of violence at the hands of a mob and by fear of the officers of the law to confess his guilt of the crime charged against him, but that such confession was false and that he had nothing whatsoever to do with, and no knowledge of the alleged crime. If you believe the theory of the defendant, Ware, . . . it is your duty to acquit him."

Having submitted the two alleged confessions to the jury in this manner, the trial court instructed the jury that:

"What the proof may show you, if anything, that the defendants have said against themselves, the law presumes to be true, but anything the defendants have said in their own behalf, you are not obliged to believe. . . ."

This treatment of the confessions by the two State courts, the manner of the confessions' submission to the jury, and the emphasis upon the great weight to be given confessions make all the more important the kind of "independent examination" of petitioners' claims which, in any event, we are bound to make. *Lisenba v. California*, 314 U. S. 219, 237-238. Our duty to make that examination could not have been "foreclosed by the finding of a court, or the verdict of a jury, or both." *Id.* We proceed therefore to consider the evidence relating to the circumstances out of which the alleged confessions came.

[3] On motion for new trial, Ashcraft's counsel urged error in that, "The court . . . in delivering his charge to the jury . . . in no place or at any time . . . presented the theory of the defendant Ashcraft to the jury. He wholly and completely in his charge ignored the theory of the defendant Ashcraft that the alleged confessions or admissions made by him . . . were not freely and voluntarily made. . . ."

First, as to Ashcraft. Ashcraft was born on an Arkansas farm. At the age of eleven he left the farm and became a farm hand working for others. Years later he gravitated into construction work, finally becoming a skilled dragline and steam shovel operator. Uncontradicted evidence in the record was that he had acquired for himself "an excellent reputation." In 1929 he married the deceased Zelma Ida Ashcraft. Childless, they accumulated, apparently through Ashcraft's earnings, a very modest amount of jointly held property including bank accounts and an equity in the home in which they lived. The Supreme Court of Tennessee found "nothing to show but what the home life of Ashcraft and the deceased was pleasant and happy." Several of Mrs. Ashcraft's friends who were guests at the Ashcraft home on the night before her tragic death testified that both husband and wife appeared to be in a happy frame of mind.

The officers first talked to Ashcraft about 6 P.M. on the day of his wife's murder as he was returning home from work. Informed by them of the tragedy, he was taken to an undertaking establishment to identify her body which previously had been identified only by a driver's license. From there he was taken to the county jail where he conferred with the officers until about 2 A.M. No clues of ultimate value came from this conference, though it did result in the officers' holding and interrogating the Ashcrafts' maid and several of her friends. During the following week the officers made extensive investigations in Ashcraft's neighborhood and elsewhere and further conferred with Ashcraft himself on several occasions, but none of these activities produced tangible evidence pointing to the identity of the murderer.

Then, early in the evening of Saturday, June 14, the officers came to Ashcraft's home and "took him into custody." In the words of the Tennessee Supreme Court,

"They took him to an office or room on the northwest corner of the fifth floor of the Shelby County jail. This office is equipped with all sorts of crime and detective devices such as a fingerprint outfit, cameras, high-powered lights, and such other devices as might be found in a homicide investigating office. . . . It appears that the officers placed Ashcraft at a table in this room on the fifth floor of the county jail with a light over his head and began to quiz him. They questioned him in relays until the following Monday morning, June 16, 1941, around nine-thirty or ten o'clock. It appears that Ashcraft from Saturday evening

at seven o'clock until Monday morning at approximately nine-thirty never left this homicide room on the fifth floor."[4]

Testimony of the officers shows that the reason they questioned Ashcraft "in relays" was that they became so tired they were compelled to rest. But from 7:00 Saturday evening until 9:30 Monday morning Ashcraft had no rest. One officer did say that he gave the suspect a single five minutes respite, but except for this five minutes the procedure consisted of one continuous stream of questions.

As to what happened in the fifth-floor jail room during this thirty-six hour secret examination the testimony follows the usual pattern and is in hopeless conflict.[5] Ashcraft swears that the first thing said to him when he was taken into custody was, "Why in hell did you kill your wife?"; that during the course of the examination he was threatened and abused in various ways; and that as the hours passed his eyes became blinded by a powerful electric light, his body became weary, and the strain on his nerves became unbearable.[6] The officers, on the other hand, swear that throughout the questioning they were kind and considerate. They say that they did not accuse Ashcraft of the murder until four hours after he was brought to the jail building, though they freely

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[4] From the testimony it appears that Ashcraft was taken from the jail about 11 o'clock Sunday night for a period of approximately an hour to help the officers hunt the place where Ware lived. On his return Ashcraft was, for a short time, kept in a jail room different from that in which he was kept the rest of the time.

[5] "As the report avers 'The third degree is a secret and illegal practice.' Hence the difficulty of discovering the facts as to the extent and manner it is practiced" IV Reports of National Committee on Law Observance and Enforcement (Wickersham Commission), U. S. Government Printing Office, 1931, Lawlessness in Law Enforcement, p. 3. Station houses and jails are most frequently employed for third degree practices, "upstairs rooms or back rooms being sometimes picked out for their greater privacy." *Id.*, The Third Degree, p. 170. Cf. Chambers v. Florida, 309 U. S. 227, 238.

[6] "'Work' is the term used to signify any form of what is commonly called the third degree, and may consist in nothing more than a severe cross-examination. Perhaps in most cases it is no more than that, but the prisoner knows he is wholly at the mercy of his inquisitor and that the severe cross-examination may at any moment shift to a severe beating. . . . Powerful lights turned full on the prisoner's face, or switched on and off have been found effective. . . . The most commonly used method is persistent questioning, continuing hour after hour, sometimes by relays of officers. It has been known since 1500 at least that deprivation of sleep is the most effective torture and certain to produce any confession desired." Report of Committee on Lawless Enforcement of Law made to the Section of Criminal Law and Criminology of the American Bar Association (1930) 1 American Journal of Police Science 575, 579-580, also quoted in IV Wickersham Report, *supra*, p. 47.

admit that from that time on their barrage of questions was constantly directed at him on the assumption that he was the murderer. Together with other persons whom they brought in on Monday morning to witness the culmination of the thirty-six hour ordeal the officers declare that at that time Ashcraft was "cool", "calm", "collected", "normal"; that his vision was unimpaired and his eyes not bloodshot; and that he showed no outward signs of being tired or sleepy.

As to whether Ashcraft actually confessed there is a similar conflict of testimony. Ashcraft maintains that although the officers incessantly attempted by various tactics of intimidation to entrap him into a confession, not once did he admit knowledge concerning or participation in the crime. And he specifically denies the officers' statements that he accused Ware of the crime, insisting that in response to their questions he merely gave them the name of Ware as one of several men who occasionally had ridden with him to work. The officers' version of what happened, however, is that about 11 P.M. on Sunday night, after twenty-eight hours' constant questioning, Ashcraft made a statement that Ware had overpowered him at his home and abducted the deceased, and was probably the killer. About midnight the officers found Ware and took him into custody, and, according to their testimony, Ware made a self-incriminating statement as of early Monday morning, and at 5:40 A.M. signed by mark a written confession in which appeared the statement that Ashcraft had hired him to commit the murder. This alleged confession of Ware was read to Ashcraft about six o'clock Monday morning, whereupon Ashcraft is said substantially to have admitted its truth in a detailed statement taken down by a reporter. About 9:30 Monday morning a transcript of Ashcraft's purported statement was read to him. The State's position is that he affirmed its truth but refused to sign the transcript, saying that he first wanted to consult his lawyer. As to this latter 9:30 episode the officers' testimony is reinforced by testimony of the several persons whom they brought in to witness the end of the examination.

In reaching our conclusion as to the validity of Ashcraft's confession we do not resolve any of the disputed questions of fact relating to the details of what transpired within the confession chamber of the jail or whether Ashcraft actually did confess.[7]

[7] The use in evidence of a defendant's coerced confession cannot be justified on the ground that the defendant has denied he ever gave the confession. White *v.* Texas, 310 U. S. 530, 531-532.

Such disputes, we may say, are an inescapable consequence of secret inquisitorial practices. And always evidence concerning the inner details of secret inquisitions[8] is weighted against an accused, particularly where, as here, he is charged with a brutal crime, or where, as in many other cases, his supposed offense bears relation to an unpopular economic, political, or religious cause.

Our conclusion is that if Ashcraft made a confession it was not voluntary but compelled. We reach this conclusion from facts which are not in dispute at all. Ashcraft, a citizen of excellent reputation, was taken into custody by police officers. Ten days' examination of the Asherafts' maid, and of several others, in jail where they were held, had revealed nothing whatever against Ashcraft. Inquiries among his neighbors and business associates likewise had failed to unearth one single tangible clue pointing to his guilt. For thirty-six hours after Ashcraft's seizure during which period he was held incommunicado, without sleep or rest, relays of officers, experienced investigators, and highly trained

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[8] State and federal courts, textbook writers, legal commentators, and governmental commissions consistently have applied the name of "inquisition" to prolonged examination of suspects conducted as was the examination of Ashcraft. See, e. g., cases cited in IV Wickersham Report, *supra*, and also pp. 44, 47, 48, and passim; Pound (Cuthbert W.), Inquisitorial Confessions, 1 Cornell L. Q. 77; Chambers v. Florida, 309 U. S. 227, 237; Bram v. United States, 168 U. S. 532, 544; Brown v. Walker, 161 U. S. 591, 596; Counselman v. Hitchcock, 142 U. S. 547, 573; cf. Cooper v. State, 86 Ala. 610, 611. In a case where no physical violence was inflicted or threatened, the Supreme Court of Virginia expressly approved the statement of the trial judge that the manner and methods used in obtaining the confession read "like a chapter from the history of the inquisition of the Middle Ages." Enoch v. Commonwealth, 141 Va. 411, 423; and see Cross v. State, 142 Tenn. 510, 514. The analogy, of course, was in the fact that old inquisition practices included questioning suspects in secret places, away from friends and counsel, with notaries waiting to take down "confessions", and with arrangements to have the suspect later affirm the truth of his confession in the presence of witnesses who took no part in the inquisition. See Encyclopedia Britannica, Fourteenth Ed., "Inquisition"; Prescott, Ferdinand and Isabella, Sixth Ed., Part First, Chap. VII, The Inquisition; VIII Wigmore on Evidence, Third Ed., p. 307. "In the more serious offenses the party suspected is arrested, he is placed on his inquisition before the chief of police, and a statement is obtained. . . . Where the office of the district attorney is in political harmony with the police system, the district attorney is generally invited to be present as an inquisitor." 2 Wharton on Criminal Evidence, Eleventh Ed., pp. 1021-1022; and see Notes 5 and 6, *supra*.

An admirable summary of the generally expressed judicial attitude toward these practices is set forth in the Report of The Committee on Lawless Enforcement of Law, 1 Amer. Journ. of Police Science, *supra*, p. 587: "Holding incommunicado is objectionable because arbitrary—at the mere will and unregulated pleasure of a police officer. * * * The use of the third degree is obnoxious because it is secret; because the prisoner is wholly unrepresented; because there is present no neutral, impartial authority to determine questions between the police and the prisoner; because there is no limit to the range of the inquisition, nor to the pressure that may be put upon the prisoner."

lawyers questioned him without respite. From the beginning of the questioning at 7 o'clock on Saturday evening until 6 o'clock on Monday morning Ashcraft denied that he had anything to do with the murder of his wife. And at a hearing before a magistrate about 8:30 Monday morning Ashcraft pleaded not guilty to the charge of murder which the officers had sought to make him confess during the previous thirty-six hours.

We think a situation such as that here shown by uncontradicted evidence is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear.[9] It is inconceivable that any court of justice in the land, conducted as our courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross examination for thirty-six hours without rest or sleep in an effort to extract a "voluntary" confession. Nor can we, consistently with Constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influences of a public trial in an open court room.[10]

The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means

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[9] Bram v. United States, 168 U. S. 532, 556, 562-563; see also Wan v. United States, 266 U. S. 1, 14-15; Burdeau v. McDowell, 256 U. S. 465, 475; Counselman v. Hitchcock, 142 U. S. 547, 573-574; 3 Elliot's Debates, pp. 445-449, 452; cf. Chambers v. Florida, 309 U. S. 227. The question in the *Bram* case was whether Bram had been compelled or coerced by a police officer to make a self-incriminatory statement, contrary to the Fifth Amendment; and the question here is whether Ashcraft similarly was coerced to make such a statement, contrary to the Fourteenth Amendment. Lisenba v. California, 314 U. S. 219, 236-238. Taken together, the *Bram* and *Lisenba* cases hold that a coerced or compelled confession cannot be used to convict a defendant in any state or federal court. And the decision in the *Bram* case makes it clear that the admitted circumstances under which Ashcraft is alleged to have confessed preclude a holding that he acted voluntarily.

[10] Compare the following allegation contained in Ashcraft's motion for new trial, "The Sheriff's deputies . . . set themselves up as a quasi judicial tribunal and tried . . . and convicted him there and in so doing rendered a trial . . . before the trial court . . . and the jury of peers . . . a mere formality," with Lisenba v. California, *supra*, p. 237. "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . . ." Cooley's Constitutional Limitations, Sixth Ed. (1890) p. 379; see also Keddington v. State, 19 Ariz. 457, 459. "The aid of counsel in preparation would be farcical if the case could be foreclosed by a preliminary inquisition which would squeeze out conviction or prejudice by means unconstitutional if used at the trial." Wood v. United States, 128 F. 2d 265, 271. See also Chambers v. Florida, *supra*, p. 237, Note 10.

of a coerced confession.[11] There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.

Second, as to Ware. Ashcraft and Ware were jointly tried, and were convicted on the theory that Ashcraft hired Ware to perform the murder. Ware's conviction was sustained by the Tennessee Supreme Court on the assumption that Ashcraft's confession was properly admitted and his conviction valid. Whether it would have been sustained had the court reached the conclusion we have reached as to Ashcraft we cannot know. Doubt as to what the State court would have done under the changed circumstances brought about by our reversal of its decision as to Ashcraft is emphasized by the position of the State's representatives in this Court. They have asked that if we reverse Ashcraft's conviction we also reverse Ware's.

In disposing of cases before us it is our responsibility to make such disposition as justice may require. "And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered." *Patterson* v. *Alabama*, 294 U. S. 600, 607; *State Tax Commission* v. *Van Cott*, 306 U. S. 511, 515-516. Application of this guiding principle to the case at hand requires that we send Ware's case back to the Tennessee Supreme Court. Should that Court in passing on Ware's conviction in the light of our ruling as to Ashcraft adopt the State Attorney General's view and reverse the conviction there then would be no occasion for our passing on the federal question here raised by Ware. Under these circumstances we vacate the judgment of the Tennessee Supreme Court affirming Ware's conviction, and remand his case to that Court for further proceedings.

The judgment affirming Ashcraft's conviction is reversed and the cause is remanded to the Supreme Court of Tennessee for proceedings not inconsistent with this opinion.

It is so ordered.

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[11] Chambers v. Florida, 309 U. S. 227; Canty v. Alabama, 309 U. S. 629; White v. Texas, 310 U. S. 530; Lomax v. Texas, 313 U. S. 544; Vernon v. Alabama, 313 U. S. 547; Lisenba v. California, 314 U. S. 219, 236-238; Ward v. Texas, 316 U. S. 547, 555; and see Bram v. United States, 168 U. S. 532.

SUPREME COURT OF THE UNITED STATES.

No. 391.—October Term, 1943.

E. E. Ashcraft and John Ware, Petitioners, *vs.* State of Tennessee. } On Writ of Certiorari to the Supreme Court of the State of Tennessee.

[May 1, 1944.]

Mr. Justice Jackson, dissenting.

A sovereign state is now before us, summoned on the charge that is has obtained convictions by methods so unfair that a federal court must set aside what the state courts have done. Heretofore the state has had the benefit of a presumption of regularity and legality. A confession made by one in custody heretofore has been admissible in evidence unless it was proved and found that it was obtained by pressures so strong that it was *in fact* involuntarily made, that the individual will of the particular confessor had been overcome by torture, mob violence, fraud, trickery, threats, or promises. Even where there was excess and abuse of power on the part of officers, the State still was entitled to use the confession if upon examination of the whole evidence it was found to negative the view that the accused had "so lost his freedom of action that the statements made were not his but were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer." *Lisenba* v. *California*, 314 U. S. 219, 241.

In determining these issues of fact, respect for the sovereign character of the several states always has constrained this Court to give great weight to findings of fact of state courts. While we have sometimes gone back of state court determinations to make sure whether the guaranties of the Fourteenth Amendment have or have not been violated, in close cases the decisions of state courts have often been sufficient to tip the scales in favor of affirmance. *Lisenba* v. *California*, *supra*, 238, 239; *Buchalter* v. *New York*, 319 U. S. 427, 431; cf. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287, 294.

As we read the present decision the Court in effect declines to apply these well-established principles. Instead, it: (1) substitutes for determination on conflicting evidence the question whether this confession was actually produced by coercion, a presumption that it was, on a new doctrine that examination in custody of this duration is "inherently coercive"; (2) it makes that presumption irrebuttable—i.e., a rule of law—because, while it goes back of the State decisions to find certain facts, it refuses to resolve conflicts in evidence to determine whether other of the State's proof is sufficient to overcome such presumption; and, in so doing, (3) it sets aside the findings by the courts of Tennessee that on all the facts this confession did not result from coercion, either giving those findings no weight or regarding them as immaterial.

We must bear in mind that this case does not come here from a lower federal court over whose conduct we may assert a general supervisory power. If it did, we should be at liberty to apply rules as to the admissibility of confessions, based on our own conception of permissible procedure, and in which we may embody restrictions even greater than those imposed upon the states by the Fourteenth Amendment. See *Bram* v. *United States*, 168 U. S. 532; *Ziang Sung Wan* v. *United States*, 266 U. S. 1; *McNabb* v. *United States*, 318 U. S. 332, 341; *United States* v. *Mitchell*, Nos. 514, 515, this Term, decided April 24, 1944. But we have no such supervisory power over state courts. We may not lay down rules of evidence for them nor revise their decisions merely because we feel more confidence in our own wisdom and rectitude. We have no power to discipline the police or law-enforcement officers of the State of Tennessee nor to reverse its convictions in retribution for conduct which we may personally disapprove.

The burden of protecting society from most crimes against persons and property falls upon the state. Different states have different crime problems and some freedom to vary procedures according to their own ideas. Here, a state was forced by an unwitnessed and baffling murder to vindicate its law and protect its society. To nullify its conviction in this particular case upon a consideration of all the facts would be a delicate exercise of federal judicial power. But to go beyond this, as the Court does today, and divine in the due process clause of the Fourteenth Amendment an exclusion of confessions on an irrebuttable pre-

sumption that custody and examination are "inherently coercive" if of some unspecified duration within thirty-six hours, requires us to make more than a passing expression of our doubts and disagreements.

I.

The claim of a suspect to immunity from questioning creates one of the most vexing problems in criminal law—that branch of the law which does the courts and the legal profession least credit. The consequences upon society of limiting examination of persons out of court cannot fairly be appraised without recognition of the advantage criminals already enjoy in immunity from compulsory examination in court. Of this latter Mr. Justice Cardozo, for an all but unanimous Court, said: "This too might be lost, and justice still be done. Indeed, today as in the past there are students of our penal system who look upon the immunity as a mischief rather than a benefit, and who would limit its scope, or destroy it altogether. No doubt there would remain the need to give protection against torture, physical or mental." *Palko* v. *Connecticut*, 302 U. S. 319, 325-26.

This Court never yet has held that the Constitution denies a State the right to use a confession just because the confessor was questioned in custody where it did not also find other circumstances that deprived him of a "free choice to admit, to deny, or to refuse to answer." *Lisenba* v. *California*, 314 U. S. 219, 241. The Constitution requires that a conviction rest on a fair trial. Forced confessions are ruled out of a fair trial. They are ruled out because they have been wrung from a prisoner by measures which are offensive to concepts of fundamental fairness. Different courts have used different terms to express the test by which to judge the inadmissibility of a confession, such as "forced," "coerced," "involuntary," "extorted," "loss of freedom of will." But always where we have professed to speak with the voice of the due process clause, the test, in whatever words stated, has been applied to the particular confessor at the time of confession.

It is for this reason that American courts hold almost universally and very properly that a confession obtained during or shortly after the confessor has been subjected to brutality, torture, beating, starvation, or physical pain of any kind is *prima facie* "involuntary." The effect of threats alone may depend more on

individual susceptibility to fear. But men are so constituted that many will risk the postponed consequences of yielding to a demand for a confession in order to be rid of present or imminent physical suffering. Actual or threatened violence have no place in eliciting truth and it is fair to assume that no officer of the law will resort to cruelty if truth is what he is seeking. We need not be too exacting about proof of the effects of such violence on the individual involved, for their effect on the human personality is invariably and seriously demoralizing.

When, however, we consider a confession obtained by questioning, even if persistent and prolonged, we are in a different field. Interrogation *per se* is not, while violence *per se* is, an outlaw. Questioning is an indispensable instrumentality of justice. It may be abused, of course, as cross-examination in court may be abused, but the principles by which we may adjudge when it passes constitutional limits are quite different from those that condemn police brutality, and are far more difficult to apply. And they call for a more responsible and cautious exercise of our office. For we may err on the side of hostility to violence without doing injury to legitimate prosecution of crime; we cannot read an undiscriminating hostility to mere interrogation into the Constitution without unduly fettering the States in protecting society from the criminal.

It probably is the normal instinct to deny and conceal any shameful or guilty act. Even a "voluntary confession" is not likely to be the product of the same motives with which one may volunteer information that does not incriminate or concern him. The term "voluntary" confession does not mean voluntary in the sense of a confession to a priest merely to rid one's soul of a sense of guilt. "Voluntary confessions" in criminal law are the product of calculations of a different order, and usually proceed from a belief that further denial is useless and perhaps prejudicial. To speak of any confessions of crime made after arrest as being "voluntary" or "uncoerced" is somewhat inaccurate, although traditional.

A confession is wholly and incontestably voluntary only if a guilty person gives himself up to the law and becomes his own accuser. The Court bases its decision on the premise that custody and examination of a prisoner for thirty-six hours is "inherently coercive." Of course it is. And so is custody and examination

for one hour. Arrest itself is inherently coercive, and so is detention. When not justified, infliction of such indignities upon the person is actionable as a tort. Of course such acts put pressure upon the prisoner to answer questions, to answer them truthfully, and to confess if guilty.

But does the Constitution prohibit use of all confessions made after arrest because questioning, while one is deprived of freedom, is "inherently coercive"? The Court does not quite say so, but it is moving far and fast in that direction. The step it now takes is to hold this confession inadmissible because of the time taken in getting it.

The duration and intensity of an examination or inquisition always have been regarded as one of the relevant and important considerations in estimating its effect on the will of the individual involved. Thirty-six hours is a long stretch of questioning. That the inquiry was prolonged and persistent is a factor that in any calculation of its effect on Ashcraft would count heavily against the confession. But some men would withstand for days pressures that would destroy the will of another in hours. Always heretofore the ultimate question has been whether the confessor was in possession of his own will and self-control at the time of confession. For its bearing on this question the Court always has considered the confessor's strength or weakness, whether he was educated or illiterate, intelligent or moronic, well or ill, Negro or white.

But the Court refuses in this case to be guided by this test. It rejects the finding of the Tennessee courts and says it must make an "independent examination" of the circumstances. Then it says that it will not "resolve any of the disputed questions of fact" relating to the circumstances of the confession. Instead of finding as a fact that Ashcraft's freedom of will was impaired, it substitutes the doctrine that the situation was "inherently coercive." It thus reaches on a *part* of the evidence in the case a conclusion which I shall demonstrate it could not properly reach on *all* the evidence. And it refuses to resolve the conflicts in the other evidence to determine whether it rebuts the presumption thus reached that the confession is a coerced one.

If the constitutional admissibility of a confession is no longer to be measured by the mental state of the individual confessor but by a general doctrine dependent on the clock, it should be capable of statement in definite terms. If thirty-six hours is more

than is permissible, what about 24? or 12? or 6? or 1? All are "inherently coercive." Of course questions of law like this often turn on matters of degree. But are not the states entitled to know, if this Court is able to state, what the considerations are which make any particular degree decisive? How else may state courts apply our tests?

The importance of defining these new constitutional standards of admissibility of confessions is emphasized by the decision to return the companion case of Ware to the Supreme Court of Tennessee for reconsideration "in the light of the ruling as to Ashcraft." Except for Ware's own testimony, all of the evidence is that when he confronted Ashcraft in custody Ware confessed immediately, voluntarily, and almost spontaneously. But he had been arrested, taken from bed into custody, and detained and questioned. Does the doctrine of inherent coerciveness condemn the Ware confession? Should the Tennessee court decide whether Ware, obviously a much weaker character than Ashcraft, was *actually* coerced into confessing? It already has decided that question and this Court does not hold the fact determined wrongly. Ware's case is properly in this Court. Why should not this Court decide Ware's case on the merits and thus test and expound its novel ruling as applied to a different set of circumstances?

No one can regard the rule of exclusion dependent on the state of the individual's will as an easy one to apply. It leads to controversy, speculation, and variations in application. To eliminate these evils by eliminating all confessions made after interrogation while in custody is a drastic alternative, but it is the logical consequence of today's ruling, as its application to the facts of Ashcraft's case will show.

II.

Apart from Ashcraft's uncorroborated testimony, which the Tennessee courts refused to believe, there is much evidence in this record from persons whom they did believe and were justified in believing. This evidence shows that despite the "inherent coerciveness" of the circumstances of his examination, the confession when made was deliberate, free, and voluntary in the sense in which that term is used in criminal law. This Court could not, in our opinion, hold this confession an involuntary one except by substituting its presumption in place of analysis of the evidence

and refusing to weigh the evidence even in rebuttal of its presumption.

As in most such cases, we start with some admitted facts. In the early morning Mrs. Asheraft left her home in an automobile to visit relatives. She was found murdered. She had not been robbed nor ravished, although an effort had been made to give the crime an appearance of robbery. The officers knew of no other motive for the killing and naturally turned to her husband for information.

On the afternoon of the crime, Thursday, June 5, 1941, they took Asheraft to the morgue to identify the body, and to the county jail, where he was kept and interviewed until 2:00 a.m. He makes no complaint of his treatment at this time. In this and several later interviews he made a number of statements with reference to the condition of the car, and as to Mrs. Asheraft's having taken a certain drug, and as to money which she was accustomed to carry on her person, which further investigation indicated to be untrue. Still Asheraft was not arrested. He professed to be willing to assist in identifying the killer. At last, on Saturday evening, June 14, an officer brought Asheraft to the jail for further questioning. He was taken to a room on the fifth floor and questioned intermittently by several officers over a period of about thirty-six hours.

There are two versions as to what happened during this period of questioning. According to the version of the officers, which was accepted by the court which saw the witnesses, what happened? On Saturday evening Asheraft was taken to the jail, where he was questioned by Mr. Becker and Mr. Battle. Becker is in the Intelligence Service of the United States Army at the present time and before that was in charge of the Homicide Bureau of the Sheriff's office of Shelby County, Tennessee. Battle has for eight years been an Assistant Attorney General of the County. They began questioning Asheraft about 7:00 p.m. They recounted various statements of his which had proved untrue. About 11:00 o'clock Asheraft said he realized the circumstances all pointed to him and that he could not explain the circumstances. They then accused him of the murder, but he denied it. About 3:00 a.m. Becker and Battle retired and left Asheraft in charge of Ezzell, a special investigator connected with the Attorney General's office. He questioned

Asheraft and discussed the crime with him until about 7:00 on Sunday morning. Becker and Battle then returned and interviewed him intermittently until about noon, when Ezzell returned and remained until about 5:00. Becker then returned, and about 11:00 o'clock Sunday night Asheraft expressed a desire to talk with Ezzell. Ezzell was sent for and Asheraft told him he wanted to tell him the truth. He said, "Mr. Ezzell, a Negro killed my wife." Ezzell asked the Negro's name, and Asheraft said, "Tom Ware." Up to this time Ware had not been suspected, nor had his name been mentioned. Asheraft explained that he did not tell the officers before because "I was scared; the negro said he would burn my house down if I told the law."

Ther upon Becker, Battle, Ezzell, and Mr. Jayroe, connected with the Sheriff's office, took Asheraft in a car and found Ware. When questioned at the jail, Ware turned to Asheraft and said in substance that he had told Asheraft when this thing happened that he did not intend to take the entire blame. The officers thereupon turned their attention to Ware. He promptly admitted the killing and said Asheraft hired him to do it. Waldauer, the court reporter, was called to take down this confession, and completed his transcript at about 5:40 a.m. He read it to Ware and told him he did not have to sign it unless he so chose. Ware made his mark upon it and swore to it before Waldauer as a Notary Public. A copy was given to Asheraft, and he then admitted that he had hired Ware to kill his wife. He was given breakfast and then in response to questions made a statement which was taken down by the court reporter, Waldauer. It was transcribed, but Asheraft declined to sign it, saying that he wanted his lawyer to see it before he signed it. No effort was made to compel him to sign the confession. However, two business men of Memphis, Mr. Castle, vice president of a bank, and Mr. Pidgeon, president of the Coca-Cola Bottling Company, were called in. Both testified that Asheraft in their presence asserted that the transcript was correct but that he declined to sign it. The officers also called Dr. McQuiston to the jail to make a physical examination of both Asheraft and Ware. He had practiced medicine in Memphis for twenty-eight years and both Mr. and Mrs. Asheraft had been his patients for something like five years. In the presence of this friendly doctor Asheraft might have complained of his treatment and avowed his innocence. The doctor testified, however, that Ash-

craft said he had been treated all right, that he made no complaint about his eyes, and that they were not bloodshot. The doctor made a physical examination, and says Ashcraft appeared normal. He further testified as to Ashcraft, "Well, sir, he said he had not been able to get along with his wife for some time; that her health had been bad; that he had offered her a property settlement and that she might go her way and he his way; and he also stated that he offered this colored man, Ware, a sum of money to make away with his wife."[1] The doctor says that that statement was entirely voluntary. No matter what pressure had been put on Ashcraft before, the courts below could reasonably believe that he made this statement voluntarily to a man of whom he had no fear and who knew his family relations.

Ashcraft's story of torture could only be accepted by disbelieving such credible and unimpeached contradiction. Ashcraft testified that he was refused food, was not allowed to go to the lavatory, and was denied even a drink of water. Other testimony is that on Saturday night he was brought a sandwich and coffee about midnight; that he drank the coffee but refused the sandwich; that on Sunday morning he was given a breakfast and was fed again about noon a plate lunch consisting of meat and vegetables and coffee. Both Waldauer, the Reporter, and Dr. McQuiston testified that they saw breakfast served to Ashcraft the next morning, before the statement taken down by Waldauer. Ashcraft claims he was threatened and that a cigarette was slapped out of his mouth. This is all denied.

This Court rejects the testimony of the officers and disinterested witnesses in this case that the confession was voluntary not because it lacked probative value in itself nor because the witnesses were self-contradictory or were impeached. On the contrary, it is impugned only on grounds such as that such disputes "are an inescapable consequence of secret inquisitorial practices." We infer from this that since a prisoner's unsupported word often conflicts with that of the officers, the officer's testimony for constitutional purposes is always *prima facie* false. We know that police standards often leave much to be desired, but we are not

[1] The officers had been baffled as to any motive for Ashcraft to murder his wife (who was his third, two former ones having been separated from him by divorce). He disclosed in his confession to them that her sickness had resulted in a degree of irritability which had made them incompatible and resulted in his sexual frustration.

ready to believe that the democratic process brings to office men generally less believable than the average of those accused of crime.

Reference also is made to the fact that when petitioner was questioned investigation had failed to unearth one single tangible clue pointing to his guilt." We cannot see the relevance of such circumstances on the question of the voluntary or involuntary character of his statements to the officers. Is the suggestion that if they had probable clews to his guilt, their questioning of him would have been better justified?

This questioning is characterized as a "secret inquisition," invoking all of the horrendous historical associations of those words. Certainly the inquiry was participated in by a good many persons, and we do not see how it could have been much less "secret" unless the press should have been called in. Of course, any questioning may be characterized as an "inquisition," but the use of such characterizations is no substitute for the detached and judicial consideration that the court below gave to the case.

We conclude that even going behind the state court decisions into the facts, no independent judgment on the whole evidence that Asheraft's confession was in fact coerced is possible. And against this background of facts the extreme character of the Court's ruling becomes apparent.

I am not sure whether the Court denies the State all right to arrest and question the husband of the slain woman. No investigation worthy of the name could fail to examine him. Of all persons he was most likely to know whether she had enemies or rivals. Would not the State have a constitutional right, whether he was accused or not, to arrest and detain him as a material witness? If it has the right to detain one as a witness, presumably it has the right to examine him.

Could the State not confront Asheraft with his false statements and ask his explanation? He did not throw himself at any time on his rights, refuse to answer, and demand counsel, even according to his own testimony. The strategy of the officers evidently was to keep him talking, to give him plenty of rope and see if he would not hang himself. He does not claim to have made objection to this. Instead he relied on his wits. The time came when it dawned on him that his own story brought him under suspicion, and that he could not meet it. Must the officers stop at this point because he was coming to appreciate the uselessness of deception?

Then he became desperate and accused the Negro. Certainly from this point the State was justified in holding and questioning him as a witness, for he claimed to know the killer. That accusation backfired and only turned up a witness against him. He had run out of expedients and inventions; he knew he had lost the battle of wits. After all honesty seemed to be the best, even if the last, policy. He confessed in detail.

At what point in all this investigation does the Court hold that the Constitution commands these officers to send Ashcraft on his way and give up the murder as insoluble? If the state is denied the right to apply any pressure to him which is "inherently coercive" it could hardly deprive him of his freedom at all. I, too, dislike to think of any man, under the disadvantages and indignities of detention being questioned about his personal life for thirty-six hours or for one hour. In fact, there is much in our whole system of penology that seems archaic and vindictive and badly managed. Every person in the community, no matter how inconvenient or embarrassing, no matter what retaliation it exposes him to, may be called upon to take the witness-stand and tell all he knows about a crime—except the person who knows most about it. Efforts of prosecutors to compensate for this handicap by violent or brutal treatment or threats we condemn as passionately and sincerely as other members of the Court. But we are not ready to say that the pressure to disclose crime, involved in decent detention and lengthy examination, although we admit them to be "inherently coercive," are denied to a State by the Constitution, where they are not proved to have passed the individual's ability to resist and to admit, deny, or refuse to answer.

III.

The Court either gives no weight to the findings of the Tennessee courts or it regards their inquiry as to the effect on the individuals involved as immaterial. We think it was a material inquiry and that respect is due to their conclusion.

The Supreme Court of Tennessee, writing in this case, stated the law of that State by which it reviewed and affirmed the action of the trial court. It said, "When confessions are offered as evidence, their competency becomes a preliminary question to be determined by the court. This imposes upon the presiding judge the duty of deciding *the fact* whether the party making the con-

fession was influenced by hope or fear. This rule is so well established that if the judge allow the jury to determine the preliminary fact, it is error, for which the judgment will be reversed.

"In the instant case the trial judge heard the witnesses as to their confessions out of the presence of the jury, and he held that under the facts he could not say that the confessions were not voluntarily made and, therefore, permitted them to go to the jury." [Emphasis supplied.]

The rule of law thus laid down complied with the law as this Court had settled it at the time of trial.

The Tennessee Supreme Court made a painstaking examination of the evidence in the light of the claim that the confessions were coerced. It concluded that it was "unable to say that the confessions were not freely and voluntarily made. Both of the plaintiffs in error have had a fair trial and we decline to disturb the conviction."

That court, it is clear, renders no mere lip service to the guaranties of the Constitution. In other cases it has set aside convictions because confessions used at trials were found to have been coerced.[2] There is not the least indication that the court was passionate or biased or that the result does not represent the honest judgment of a high-minded court, sensitive to these problems.

A trial judge out of hearing of the jury saw and heard Ashcraft and saw and heard those whom Ashcraft accused of coercing him. In determining a matter of this kind no one can deny the great advantage of a court which may see and hear a man who claims that his will succumbed and those who, it is claimed, were so overbearing. The real issue is strength of character, and a few minutes' observation of the parties in the courtroom is more informing than reams of cold record. There is not the slightest indication that the trial judge was prejudiced or indifferent to the prisoner's rights. Ashcraft's counsel moved to exclude his confession "for the reason that the statements contained therein were not freely and voluntarily made, nor were they free from duress and restraint, but were secured by compulsion. . . ." The court said, " . . . the sole proposition, as the Court sees it from this testimony, is that he was confined and questioned for a

[2] Deathridge v. State, 33 Tenn. 75; Strady v. State, 43 Tenn. 300; Self v. State, 65 Tenn. 244; Cross v. State, 142 Tenn. 510; Rounds v. State, 171 Tenn. 511.

period of approximately thirty-six hours. I think counsel concedes that is practically the main ground upon which he rests his motion. There was no physical violence offered to the defendant Ashcraft, and none was claimed." He overruled the motion and received the confession. This Court, not one of whose members ever saw Ashcraft of any one of the State's witnesses, overturns the decision by the trial judge.

Moreover, a jury held Ashcraft's statements incredible. After the trial judge, out of their presence, heard the evidence and decided the confession was admissible, the jury heard the evidence to decide whether the confession should be believed. Ashcraft again testified and so did all of the witnesses for the State. Conduct of the hearing both by the judge and the prosecutors was above criticism. The Court observes: "If, therefore, the question of the voluntariness of the two confessions was actually decided at all it was by the jury." Is it suggested that a state consistently with the Constitution may not leave this question to the sole determination of a jury? I had supposed that the constitutional duty of a state when such questions of fact arise is to furnish due process of law for deciding them. Does not jury trial meet this test? Here Tennessee, and I think very commendably, provided the double safeguards of a preliminary trial by the judge and a final determination by the jury.

The Court's opinion makes a critical reference to the charge of the trial judge. However, diligent counsel took no exception to the part of the charge quoted, made no request for further instruction on the subject, and assigned no error to the charge. Even if we think the charge inadequate, does the inadequacy of a charge constitute want of due process? And if so, do we review questions as to the charge although counsel for the petitioner made no objection during the trial when the judge could have corrected the error, but after the trial was over assigned it as one of twelve reasons for demanding a new trial?

No conclusion that this confession was actually coerced can be reached on this record except by reliance upon the utterly uncorroborated statements of defendant Ashcraft. His testimony does not carry even ordinary guaranties of truthfulness, and the courts and jury were not bound to accept it. Perjury is a light offense compared to murder and they may well have believed that Ashcraft was ready to resort to a lesser crime to avoid conviction.

of a greater one. Furthermore, the very grounds on which this Court now upsets his conviction Ashcraft repudiated at the trial. He asserts that he was abused, but he does not testify as this Court holds that it had the effect of forcing an involuntary confession from him. On the contrary, he flatly insists that it had no such effect and that he never did confess at all.

Against Ashcraft's word the state courts and jury accepted the testimony of several apparently disinterested witnesses of high standing in their communities, in addition to that of the accused officers. One of the witnesses to Ashcraft's admission of guilt was his own family physician, two were disinterested business men of substance and standing, another was an experienced court reporter who had long held this position of considerable trust. Another was a member of the bar. Certainly, the state courts were not committing an offense against the Constitution of the United States in refusing to believe that this whole group of apparently reputable citizens entered into a conspiracy to swear a murder onto an innocent man, against whom not one of them is shown to have had a grievance or a grudge.

This is not the case of an ignorant and unrepresented defendant who has been the victim of prejudice. Ashcraft was a white man of good reputation, good position, and substantial property. For a week after this crime was discovered he was not detained, although his stories to the officers did not hang together, but was at large, free to consult his friends and counsel. There was no indecent haste, but on the contrary evident deliberation, in suspecting and accusing him. He was not sentenced to death, but for a term that probably means life. He was defended by resourceful and diligent counsel.

The use of the due process clause to disable the states in protection of society from crime is quite as dangerous and delicate a use of federal judicial power as to use it to disable them from social or economic experimentation. The warning words of Mr. Justice Holmes in his dissenting opinion in *Baldwin* v. *Missouri*, 281 U. S. 586, 595, seem to us appropriate for rereading now.

Mr. Justice ROBERTS and Mr. Justice FRANKFURTER join in this opinion.